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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

BRIAN WHITE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Collin County
Fifth District Court of Appeals
Cause No. 05-15-00819-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Brian Jason White.
- The trial judge was Hon. Angela Tucker, Presiding Judge of the 199th Judicial District, Collin County, Texas.
- Trial counsel for Appellant was John Tatum, 2150 South Central Expressway, McKinney, Texas 75070.
- Counsel for Appellant before the court of appeals were Jeremy Rosenthal and Eddie Cawlfield, 4500 W. Eldorado Parkway, Suite 3000, McKinney, Texas 75070.
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- Counsel for the State before the court of appeals was Assistant District Attorney Libby Lange, 2100 Bloomdale Road, McKinney, Texas 75071.
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No. PD-0442-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

BRIAN WHITE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Collin County
Fifth District Court of Appeals
Cause No. 05-15-00819-CR

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

The party invoking Article 38.23 and claiming that evidence was obtained in violation of a statute has an initial burden of production to support such a claim. Although this rule has arisen in pretrial suppression hearings, where there is an additional reason to assign the burden of production to the movant, the rule should be no different during trial. Contrary to Appellant's understanding, the proponent of evidence should not have to pre-emptively refute a defendant's unsubstantiated claim that he is entitled to the exclusionary remedy.

STATEMENT OF THE CASE

Appellant was convicted in a jury trial of engaging in organized criminal activity and money laundering. CR 15, 142-43. In an outside-the-presence hearing following voir dire and again during trial, the trial judge refused to suppress an audio recording of Appellant, his co-defendant, and another person based on Appellant's allegation that it was unlawfully obtained. The court of appeals affirmed the suppression ruling and his convictions.

STATEMENT REGARDING ORAL ARGUMENT

The State asks the Court to reconsider its decision not to grant argument. The issue of who bears the burden of proof at trial versus pretrial looks deceptively simple. The State believes hashing things out orally will speed resolution of the case.

ISSUE GRANTED

> Whether the proponent of evidence at trial has the burden of showing statutory compliance in response to an objection under Article 38.23 (the Texas exclusionary rule).

STATEMENT OF FACTS

Roofing company owner Jason Earnhardt hired Appellant, his co-defendant Ronald Robey, and J.D. Roberts.[1] 3 RR 85-89; 3 RR 148-51; SX 3, 4, 15. Not long

[1] Robey was hired as a sales manager, and he brought in Appellant and Roberts. 3 RR 150-57.

after, Robey, Appellant, and Roberts filed an assumed name certificate and listed themselves (without Earnhardt) as owners of the business. SX 8. The three men then opened two bank accounts and diverted money from customers who thought they had contracted with Earnhardt. SX 9 & 10 (bank records), 10 (bank record); 3 RR 21, 153-55, 165. To prevent Earnhardt from discovering their scheme, the men posted hundreds of fake Craigslist ads that flooded the company with calls and shut down the phone system. 3 RR 155-56.

Earnhardt learned Appellant and Robey were behind the ads when a man called Brandon (who was performing IT work for the men) called him. 3 RR 157-58; SX 35. Brandon gave Earnhardt an audio recording. On it, Appellant, Robey, and Brandon talked about "blow[ing] Earnhardt's phones up" with the fake ads. *Id*.

During a motion-in-limine hearing after the jury was sworn in and before opening statements, the defense argued the recording was a "surreptitiously recorded conversation between two people or three people that [the State's sponsoring witness Earnhardt] was not a party to" and illegally obtained because it was "the equivalent of a wiretap." 2 RR 179-80. The State proffered the recording itself, but neither side called any witnesses. 2 RR 180. The trial court listened to the recording, which prompted the following exchange:

THE COURT: Help me if I'm wrong, but Brandon was part of the conversation and is the belief that the audio came from Brandon, right?

[STATE]: Yes, Your Honor.

[DEFENSE[2]]: It's the belief. That's part of the deal. There's really no way to know where it came from. Whether the person that identified himself as Brandon is even actually the person that recorded the conversation.

THE COURT: Right. But you told me before the break that you believe it was illegally obtained. And so that's why I was trying to identify who all was part of the conversation. And, again, I haven't heard in the context of the trial, but it sounds like it was [the] belief that it was received from this Brandon person.

[DEFENSE]: That's the way it's represented.

THE COURT: Okay. You may continue.

[DEFENSE]: Certainly, we never consented to the recording of any conversation of that nature. There's nothing to indicate on the recording itself that anyone was aware that the conversation was being recorded.

THE COURT: Other than Brandon?

[DEFENSE]: Well, there's nothing on the recording, period, that suggests anyone to the conversation is aware of it.

THE COURT: Right. But is there anything that says that Brandon was not aware like someone else reportedly gave it to Brandon?

[2] Robey and Appellant were tried together. These arguments and those at trial were made by Robey's attorney but were adopted by Appellant. 2 RR 190; 3 RR 161.

> [DEFENSE]: I don't know. I don't even know if Brandon is a real person's name or if that's just a made up name.
>
> THE COURT: That's the name -- somebody says Brandon on the audio. So, I don't know. You may continue.
>
> [DEFENSE]: Okay. Well, I mean, all I can say to that, Your Honor, is we don't know where the recording was created. We don't know when the recording was actually created. And there's certainly nothing on the recording itself that would suggest that the parties were aware they were being recorded.

2 RR 188. The trial court denied the motion in limine and tentatively ruled the exhibit admissible "assuming the State lays the appropriate predicate." 2 RR 189.

The next day at trial, Earnhardt testified that the voices on the recording were Appellant's, Robey's, and Brandon's and that Brandon had given him the recording. 3 RR 158. Although he never met Brandon in person, he and Brandon talked by phone. 3 RR 158. The defense took Earnhardt on voir dire. He confirmed that he was not a party to the conversation and had no knowledge of where the recording was made. 3 RR 160. It appeared from the recording that Appellant and the others were in their office. *Id*. The defense objected to the exhibit, stating, "I don't think that they've established that it was a legally-obtained [sic] recording."[3] 3 RR 161. The trial court overruled the defense objections and admitted the recording. *Id*.

[3] Later in trial, Robey testified on his own behalf that he did not know he was being recorded but thought that Brandon had made the recording. 4 RR 129-30.

On appeal, the court of appeals cited *Robinson v. State* and held that a defendant who moves for suppression under article 38.23 due to the violation of a statute has the burden of producing evidence of a statutory violation. *White v. State*, No. 05-15-00819-CR, 2017 Tex. App. LEXIS 1964, at * 11 (Tex. App.—Dallas Mar. 8, 2017) (not designated for publication) (citing *Robinson*, 334 S.W.3d 776, 779 (Tex. Crim. App. 2011)).

SUMMARY OF THE ARGUMENT

When a party seeks the sanction of the exclusionary rule because of a statutory violation, this Court has, in the pretrial context, placed an initial burden of production on the defense to prove a statutory violation. There is no logical reason for the rule to be any different when the defense claim of illegality arises during trial. He should have to substantiate such an assertion before the State is put to any proof. While the State shoulders a burden of establishing an evidentiary predicate when it is the proponent of evidence, it is not part of any evidentiary foundation to disprove that any crimes were committed in the collection of that evidence.

ARGUMENT

I. Under *Robinson*, the defense has the initial burden of production.

The court of appeals properly relied upon *Robinson* to hold that Appellant had the initial burden of producing evidence that the recording was an illegal wiretap.

A. The usual rule is that the defense carries this burden.

The Texas exclusionary rule does not expressly set out who has the burden of proving to the trial court that evidence should be excluded.[4] This Court held in *Robinson* that "a defendant who moves for suppression under Article 38.23 due to a violation of a statute has the burden of producing evidence of a statutory violation." 334 S.W.3d at 779; *Pham v. State*, 175 S.W.3d 767, 772 (Tex. Crim. App. 2005); *Roquemore v. State*, 60 S.W.3d 862, 869 (Tex. Crim. App. 2001). "Only when this burden is met does the State bear a burden to prove compliance." 334 S.W.3d at 779.

This is consistent with numerous other threshold suppression issues that the defendant must prove, including standing,[5] that a search or seizure occurred,[6] that

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[4] When a contested issue of fact is submitted to the jury for its resolution, the State must convince the jury beyond a reasonable doubt that the evidence was not obtained in violation of the law or it will be disregarded. TEX. CODE CRIM. PROC. art. 38.23(a). The Code's provision that the defense can open and close argument in a pretrial suppression hearing suggests that the defense has the burden of proof at that stage. *Id*. art. 28.02; Dawson, Robert, "State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience," 59 TEX. LAW R. 191, 250 (1981).

[5] *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *Jones v. United States*, 362 U.S. 257, 261 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."), overruled on other grounds by *United States v. Salvucci*, 448 US 83 (1980); *Fuller v. State*, 829 S.W.2d 191, 202 (Tex. Crim. App. 1992).

[6] Russell claimed she was illegally arrested when she was returned to the police

the circumstances raise a question as to the voluntariness of his confession,[7] that a hospital blood draw was nonconsensual,[8] that the defendant's statement was the product of custodial interrogation,[9] and that there is a causal connection between a statutory violation and the evidence.[10] And it is consistent with the Supreme Court's statement in *Nardone v. United States* that where the defense claimed evidence had been secured by illegal wiretapping, the burden is "on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed." 308 U.S. 338, 341 (1939). In all these cases, the burden is on the defendant to produce evidence of illegality before the State is required to counter the claim with its own proof.[11]

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station after having fled. *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). While the testimony established that there was no arrest warrant, Russell presented no evidence about the circumstances of how she returned to the police station. Without this, Russell could not establish that she was seized and failed to meet her initial burden of production. *Id*. at 11.

[7] *State v. Terrazas*, 4 S.W.3d 720, 725 (Tex. Crim. App. 1999).

[8] *State v. Kelly*, 204 S.W.3d 808, 819 n.22 (Tex. Crim. App. 2006).

[9] *Wilkerson v. State*, 173 S.W.3d 521, 532 (Tex. Crim. App. 2005).

[10] *Pham*, 175 S.W.3d at 774 (Family Code provision requiring parental notification when a juvenile is in police custody).

[11] The defense has this initial burden when it comes to the Fourth Amendment as well. *Russell*, 717 S.W.2d at 9. In a warrantless search situation, this burden may be so easily overcome that the State often stipulates to the lack of a warrant. But in the

B. There is no reason the burden should be different at trial than pretrial.

Not surprisingly, the context in which this Court's caselaw on suppression-issue burdens has arisen has typically been pretrial suppression hearings. This was the case in *Robinson*.[12] "There is no reason to shift the burden of proof on the basis of whether the defendant chooses to raise the matter before trial and whether the trial judge agrees to address it before trial starts." Dix & Schmolesky, 41 TEX. PRAC. § 18.20.50 (3d. ed.); *see also Black v. State*, 362 S.W.3d 626, 633 (Tex. Crim. App. 2012) (finding such happenstance should not dictate whether a judge can allow a party to reopen the evidence).[13] A motion to suppress is "nothing more than a specialized objection to the admissibility of that evidence." *Black*, 362 S.W.3d at 633 (quoting *Galitz v. State*, 617 S.W.2d 949, 952 n.10 (Tex. Crim. App. 1981)). A pre-trial suppression hearing is a specific application of Rule 104(a) of the Texas Rules of Evidence. *Ford v. State*, 305 S.W.3d 530, 534 (Tex. Crim. App. 2009).

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absence of agreement on the basic operative facts, the defense still carries the initial burden.

[12] 334 S.W.3d at 777.

[13] As this case illustrates, a pretrial hearing may precede the trial objection by mere hours. The trial court's admissibility ruling should not depend on something so trivial.

And at least twice before, this Court has refused to place the burden of proof differently depending on whether an evidentiary matter is taken up pretrial or during trial. *See Roberts v. State*, 545 S.W.2d 157, 158–59 (Tex. Crim. App. 1977) ("Contrary to the appellant's argument there is no difference in the State's burden of proof [of showing there was probable cause for a warrantless arrest] whether the issue is presented at a pretrial motion to suppress hearing or at the trial on the merits."); *State v. Esparza*, 413 S.W.3d 81, 86 (Tex. Crim. App. 2013) ("Allocation of the burden with respect to scientific reliability as a function of Rule 702 should be no different in the context of a pretrial motion to suppress than it is when the issue is raised during the course of trial.").

C. Rebutting an exclusionary rule violation is not part of the State's evidentiary foundation.

Judge Cochran's concurrence in *Robinson* argues that the State should shoulder the burden at trial of proving statutory violations because, "As the proponent of evidence at trial, the State must fulfill all required evidentiary predicates and foundations." 334 S.W.3d at 782. While this is true for the Rules of Evidence and statutes governing the admissibility of particular evidence (*e.g.*, outcry under Art. 38.072, or the defendant's statements under Art. 38.22), there is no reason to extend this foundational status (and the ability to exclude evidence based solely

on an objection unsupported by any evidence) to every state law.[14] Although Article 38.23(a) may not be invoked for statutory violations unrelated to the purpose of the exclusionary rule or to prevent the illegal procurement of evidence of a crime, *Wilson v. State*, 311 S.W.3d 452, 459 (Tex. Crim. App. 2010), the scope of possible statutes is still much broader than the Rules of Evidence and evidentiary statutes in the Code of Criminal Procedure.[15] Further, these laws (such as theft, criminal trespass, or wiretapping under Penal Code § 16.02) do not address the admissibility of evidence and thus should not form part of its evidentiary foundation. It is only through the mechanism of Article 38.23 that violation of these laws have anything

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[14] Appellant asserts that "*Robinson* was carefully worded to avoid altering the normal rule that a proponent of evidence at trial shoulders the burden of admissibility upon an Article 38.23 objection." App. Brief at 7. The State sees no such signaling in *Robinson*. The issue arose in a suppression hearing, and so that was the issue before the Court. Another judge expressed uncertainty about the key to whether the normal rule would apply: whether disproving potential statutory violations is part of the State's required predicate for admission of evidence at trial. As Judge Price wrote in dissent: "In her concurring opinion, Judge Cochran asserts that 'at trial, the State will be required to offer evidence that the blood was drawn by a qualified person . . . before evidence of the blood, the blood test, and the blood results are admissible.' Although she cites no authority for this proposition, I believe it to be a correct statement of the law." *Robinson*, 334 S.W.3d at 783 (Price, J., dissenting).

[15] When the State offers a map from Google Earth into evidence, for instance, does the State also need to ask the sponsoring witness why there was no violation of copyright laws in printing the map and no privacy violations when Google took the images?

to do with the admission or exclusion of evidence. And far from conforming to the purposes of the Rules of Evidence to "ascertain the truth and secure a just determination,"[16] the exclusionary rule actually erects barriers to truthful and probative evidence before the jury. *See Rakas*, 439 U.S. at 137 (federal exclusionary rule); *Lego v. Twomey*, 404 U.S. 477, 488-89 (1971) (same). Thus, statutes that are not aimed at admissibility of evidence at trial should not be part of the State's foundational requirements for admitting evidence.[17]

D. Fairness and policy principles justify the defense carrying the initial burden.

Both fairness and policy justify placing the burden of production on the party claiming an exclusionary rule sanction. First, the burden of proof is frequently allocated to the party that is seeking a change in the status quo. *Marquez v. State*, 921 S.W.2d 217, 222 (Tex. Crim. App. 1996) (defendant had burden concerning

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[16] TEX. R. EVID. 102.

[17] Neither of the possible statutes in this case are part of the evidentiary predicate. TEX. PENAL CODE § 16.02 has no reference to the admission of evidence at trial. Code of Criminal Procedure Article 18.20, Section 2(a)(1) is about the admission of evidence but places the burden on the opponent of the evidence and directs the parties back to § 16.02. TEX. CODE CRIM. PROC. art. 18.20, § 2(a)(1) (intercepted communications "may be received in evidence . . . unless the communication was intercepted in violation of . . . Section 16.02"). A nonapplicability provision underscores that Article 18.20 "does not apply to conduct described as an affirmative defense under Section 16.02(c)," which would exempt a party to a conversation from incurring criminal liability. *Id*. § 17.

withdrawal of jury trial waiver). "When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case." *Mattei v. State*, 455 S.W.2d 761, 766 (Tex. Crim. App. 1970) (quoting *Rogers v. United States*, 330 F.2d 535, 542 (5th Cir. 1964)). Although being the movant in a suppression hearing is a reason for placing the burden on the defendant pretrial, *Pham*, 175 S.W.3d at 774, that reason persists even at trial because the defendant seeks a change in the status quo in a way that the typical opponent of evidence does not. The defense is accusing another of violating the law and should shoulder an initial burden of supporting that claim. Even if the "presumption of proper police conduct" does not apply when it is alleged that a private individual violated the law,[18] it is not appropriate to presume illegality.[19] In the vast majority of cases, evidence

[18] Judge Cochran's concurrence in *Robinson* began with a broader presumption that was not restricted to police action: "The law starts with the presumption of proper and lawful conduct. For example, it assumes that the police have acted in compliance with all constitutional and statutory requirements in making an arrest." 334 S.W.3d at 779 (Cochran, J., concurring). The presumption of innocence supports extending to private individuals a presumption of lawfulness.

[19] *Franks v. Delaware*, 438 U.S. 154, 155 (1978) is an analogous situation. While the Court ultimately permitted defendants to challenge the truthfulness of statements in a warrant affidavit, the Supreme Court recognized the state's concern that only a minimal number of perjurious statements would be "weeded out." *Id.* at 166. In response, the Court required a "substantial preliminary showing" and not "mere demand" before a claim could go forward.

will be obtained without any crime being committed in the process.[20] The infrequency with which violations are likely to occur and the defense will also be unable to shoulder its burden helps alleviate the concern that the judicial system could, on occasion, permit evidence that was obtained through an illegality.[21]

Appellant argues that the State has superior control, access, and presumed knowledge about the circumstances under which its own evidence was acquired. App. Brief at 12. But given that a defendant must assert a violation of his own personal, privacy, or property interest and has a discovery right to all offense reports and the physical evidence the State intends to offer,[22] the defense will typically have knowledge and access to information equal to the State.

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[20] Exceptions exist, obviously, but an assessment of the probabilities on the whole favor beginning with a presumption of legality rather than illegality.

[21] It will be rare for the defense not to meet its burden. The person with the information is almost always the sponsoring witness, and the defense can establish the elements of the offense or other statutory violation on voir dire of that witness. *See, e.g.*, *Wilson*, 311 S.W.3d at 464 (detective "forthrightly admitted" in pretrial suppression hearing to creating false fingerprint report with intent that it would induce suspect to confess); *Baird v. State*, 398 S.W.3d 220, 222 (Tex. Crim. App. 2013) (house- and pet-sitter testified at suppression hearing to events leading to her finding child pornography on defendant's computer). There is no indication in the record here that the State had access to Brandon or knew any more about him that would enable prosecutors to locate him for trial.

[22] TEX. CODE CRIM. PROC. art. 39.14(a).

Finally, as the United States Supreme Court recognized, there is a cost to litigating claims of illegality on the mere conclusory say-so of a party:

> To interrupt the course of the trial for such auxiliary inquiries [as a wiretapping violation] impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession.

Nardone, 308 U.S. at 342.

The court of appeals properly held that Appellant had an initial burden of producing evidence of a statutory violation before the State was called upon to disprove such a claim.

II. This case does not turn on the burden of proof.

This may not present the best case for deciding who should have the burden of production on a statutory violation because nothing in the case turns on that fact. The record supports the conclusion that Brandon, the "IT guy," was a party to the conversation. And it is a rational inference that he recorded it given that it was in his possession and he went to some effort to transfer it to a stranger who was likely to use it as evidence. Consequently, it was not illegal. TEX. PENAL CODE § 16.02(c)(4)(A). This was the trial court's conclusion, and it is entitled to deference. *See Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); 2 RR 188 ("[Defense]: There's nothing to indicate on the recording itself that anyone was

aware that the conversation was being recorded. THE COURT: Other than Brandon?"). Although mundane, it is more likely that Brandon recorded the conversation than any of the imaginative scenarios Appellant includes in his brief to this Court. *See* App. Brief at 11. Thus, even if the State had an initial burden of proving that the recording was lawfully obtained, the recording suffices under any standard.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals affirm the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,634 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
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CERTIFICATE OF SERVICE

The undersigned certifies that today, on the 28th day of December 2017, the State's Brief was served on the parties below as indicated:

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